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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
Petitioner,

v.

HAGGAR APPAREL COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to Rule 25.5 of the Rules of this Court, respondent respectfully submits this supplemental brief to present respondent's views on public documents -- namely, certain comments filed in response to the Customs Service's Notice of Proposed Rulemaking issued in 1974 that was the basis for the regulations in this case -- that were "not available in time to be included" in respondent's brief. See Sup. Ct. R. 25.5.

PROCEDURAL BACKGROUND

The regulations at issue in this case were set forth for public notice and comment in a Notice of Proposed Rulemaking issued on July 5, 1974. See 39 Fed. Reg. 24561 ("the NPRM"). Respondent first requested a copy of the comments filed in response to the NPRM from the agency on November 16, 1998, and filed a Freedom of Information Act Request for them on November 18, 1998. See Lodging of Respondent at Tabs A & B (lodging filed December 10, 1998). Respondent was initially informed that the comments had been lost or destroyed. *Id.* at Tab B. Respondent's brief, filed on December 8, 1998, reflected that understanding. Respondent's Br. at 49-50 & n.12.

On December 9th, 1998, one day after the filing of Respondent's brief, Respondent received notice that Customs had located the comments on the NPRM. Lodging of Respondent at Tabs C & D. Respondent brought this fact to the Court's attention in the Lodging of Respondent and accompanying cover letter, dated December 10, 1998, which lodged 10 documents (Tabs A through J).

Respondent promptly ordered a copy of the comments, and received that copy on the afternoon of December 11, 1998. Second Lodging of Respondent, at Tab K. The letter from

Customs transmitting the comments stated that Customs had located and was providing "all the comments received" by Customs in response to the NPRM. *Id.* Accordingly, together with the filing of this supplemental brief, respondent is lodging with the Clerk three copies of the full set of the comments as transmitted by Customs to Respondent on December 11, 1998.

In addition, Respondent is also lodging 20 copies of those particular comments, and excerpts of comments, that Respondent believes are particularly relevant to several of the issues in this case, as well as the letter from Customs transmitting the comments to the document retrieval service. Second Lodging of Respondent (Tabs K through T). The transmittal letter appears at Tab K, and the selected comments, referred to below, appear at Tabs L through T.

ARGUMENT

The comments that Customs received on the NPRM concerning the regulations at issue in this case are directly relevant in at least three respects, discussed below, to the arguments that Respondent raised in its brief. Most importantly, however, the comments confirm that Customs issued its regulations interpreting the TSUS solely for public information and to guide customs officers, not to bind the courts.

1. The lodged documents strongly support the points, made at pages 28-33 and 35-36 of respondent's brief, that Customs lacks authority to issue substantive regulations interpreting the Tariff Schedule of the United States (TSUS), that Customs understood that it lacked such authority when it issued the final rule, and that Customs therefore revised its regulations to make clear that it was not purporting to exercise such authority.

To begin with, several of the commenters expressly pointed to the lack of any statutory authority for Customs to issue substantive interpretations of the TSUS. Three of the commenters expressly observed that Customs lacked authority, under Headnote 11, to promulgate any regulations other than procedural rules "addressed to obtaining *facts* that are not determinable from an examination of an article in its condition as imported." Baker & McKenzie Comments at p. 3 (attached at Tab M); see Submission of American Importers Association at p. 1 (Tab O) ("By its very language such headnote [11] authorizes the Secretary of the Treasury to promulgate regulations only insofar as they require the submission of facts which are a prerequisite to a claim under item 807.00, and which are not determinable from an examination of the imported merchandise."); Stewart & Ikenson Comments at pp. 24-25 (Tab L). Compare with Resp. Br. 31-33 (similarly arguing that Headnote 11, on its face, provides authority only for procedural rules, and adding further support from legislative history).

Beyond Headnote 11, one commenter went on to survey the other sources of statutory authority cited in the NPRM. See Baker & McKenzie Comments at pp. 2-4 (attached at Tab M). These comments concluded that none of the provisions, including 19 U.S.C. § 66, 19 U.S.C. § 1502, 19 U.S.C. § 1624, or Headnote 11, gave the Secretary the authority to issue substantive interpretations of the TSUS. Compare with Resp. Br. 28-31 & n.7 (similarly reviewing each cited source of statutory authority and concluding that none authorizes substantive rulemaking).

Many other commenters, without providing a comparably detailed analysis of statutory authority, asserted that the Customs Service lacked authority to issue interpretive rules because that function was reserved to Congress and, significantly, because such rulemaking would unduly infringe on

the role of the judiciary in interpreting item 807.00. See Comments of Foreign Trade Ass'n of Southern California at 1 (Tab N) (the proposed interpretive rules constitute improper "legislation by the Customs Service" and also "impinge directly upon the function of the judiciary in interpreting . . . Item 807.00"); Comments of Louis Schneider at 1 (Tab P) (definitions and interpretive regulations "go beyond the authority delegated to the Secretary"); Comments of Los Angeles Area Chamber of Commerce at 1-2 (Tab Q) ("we are firmly convinced that in large measure, the proposed Regulations exceed the Secretary's authority" and "improperly infringe on the functions of the Congress and of the Judiciary and seriously limit and amend the statutory provisions"); Comments of Mattel, Inc. at 4 (Tab R) ("the proposed rules go beyond the administrative function of Headquarters and encompass areas of definition which should be decided by Congress or the courts"); Comments of S. Richard Shostack at 1 (Tab S) (interpretive rules, "as contrasted to the Procedural regulations," are "not the proper subject of regulations").

In light of this problem, the commenters argued for one of two results. Many claimed that Customs should simply delete the interpretive regulations from the final rule, and publish, at most, a revised set of interpretations separately as guidelines or in a pamphlet. See, *e.g.*, Submission of American Importers Ass'n at 1 (Tab O) ("interpretations as to substance do not belong as regulations"); Comments of Foreign Trade Ass'n of Southern California at 2 (Tab N) (agency's "purposes can be achieved by the issuance of further guidelines" and by further "interpretative rulings" rather than by regulations); Comments of Mattel, Inc. at 4 (Tab R) (Customs' "rulings and guidelines should remain as such and not be included as part of the Customs Regulations").

Others suggested that, if the Secretary were to go forward with the interpretive regulations, "it would be appropriate to *segregate* those *procedural* regulations which were intended to govern the admission of articles under Item 807.00, *i.e.* proposed Section 10.17, from those *informative, advisory,* and *interpretative* rulings which serve the function of notifying the public of Customs' constructions of the law, *i.e.*, all of the other proposed regulations relating to item 807.00." Stewart & Ikenson Comments at p. 25 (Tab L) (first emphasis added); see also Baker & McKenzie Comments at p. 8 (Tab M) ("we recommend that those provisions that deal with procedures be specifically grouped under a major subheading entitled 'Procedures.' . . . . If any interpretive material is issued, such interpretive material should be characterized as interpretive").

In fact, these same two commenters further suggested that, if Customs were to go forward with both procedural rules and interpretive rules, segregated as they recommended, that Customs also replace the general introductory regulation, "proposed Section 10.11," with a new introduction that clearly introduced the "interpretive rule[s]" separately from the procedural rules, and that made clear that the interpretive rules were being "promulgated so that the public may be informed as to the constructions and interpretations the Customs Service has given to relevant statutory terms." Stewart & Ikenson Comments at p. 25 (Tab L); see Baker & McKenzie Comments at pp. 7-8 (Tab M) (recommending revisions to section 10.11 to distinguish "procedures" and "requirements" from "any interpretive material" that may be issued).

Given these comments, the agency's response is particularly telling. The Customs Service made absolutely no effort in any way to dispute the showing made by the commenters that it lacked statutory authority to issue binding

interpretations of the TSUS. To the contrary, Customs expressly *acquiesced* in the commenters' analysis of its lack of statutory authority to issue such binding rules. It did so by acknowledging that, "[a]fter consideration of the numerous comments received, the following changes have been made," and by then adopting one of the solutions proposed by the commenters to remedy this very problem. 40 Fed. Reg. 43021.

Specifically, in the agency's words, the agency explained that "Section 10.11 was rewritten to *explain the difference* between interpretative and procedural regulations. Further, the numbering of the sections was changed and the sections were so organized that *their sequence reflects the difference between interpretative and procedural matters.*" 40 Fed. Reg. 43021 (emphasis added). The agency then followed the commenters' recommendation of replacing proposed section 10.11 with a new section 10.11 that had two subparts, (a) and (b), which separately introduced the interpretive rules and the procedural rules. *Id.* Finally, in subpart (a), which introduced the definitions in 10.12 and the interpretive rules in sections 10.13 through 10.23, the agency stated, in language that closely parallels language that one of the commenters proposed for this very purpose, that the interpretive rules were being provided merely to "inform the public" of the constructions of the TSUS that customs officers would give "at the ports of entry." Compare 19 C.F.R. § 10.11 with Stewart & Ikenson Comments at p. 25 (Tab L). And consistent with the many comments that accused the agency of improperly intruding on the judicial role in interpreting item 807.00, the agency added the further disclaimer that "[n]othing" in the interpretive rules was "intended to restrict the legal right of importers or others to a judicial review of the matters contained therein." 19 C.F.R. § 10.11(a). By contrast, in subsection (b), Customs referred to section 10.24 as setting forth the "documentary requirements" applicable to item 807.00, and specified that "[a]llowance of an

importer's claim" was dependent upon compliance with those documentary and other statutory "requirements." 19 C.F.R. § 10.11(b).

Having failed to defend that it had substantive rulemaking authority, and having revised its rules to make clear that it was not exercising such authority, Customs may not fairly claim now, almost 25 years later, that its interpretive rules provide a basis for altering the standard of review in de novo judicial proceedings and for restricting the rights of importers. In short, the agency's response to the comments conclusively forecloses the agency's belated claim for *Chevron* deference.

2. The foregoing point is dispositive. But the comments also directly support a separate argument against deference, made at pages 40-43 of Respondent's brief. As in the brief, the comments point out that the two criteria that the agency used to classify certain operations as not "incidental to the assembly process" are improper. 19 U.S.C. § 1202, Item 807.00; see Comments submitted by Arnold & Porter at pages 6-7 (Tab T). For example, the comments state that "[t]here is no basis in Item 807 for making the purpose of the operation determinative" of whether it is incidental, and further note that "[t]he great preponderance of operations held to have been incidental to assembly have involved completion, modification or physical or chemical improvement of a component." *Id.* at 6. The comments also argue that it is inappropriate for the regulations to exclude an operation from a duty allowance merely because it "'is not related to the assembly process.'" *Id.* at 6-7. The argument expressed in these comments is a valid reason for rejecting the regulations as inconsistent with the statute. See Respondent's Br. 40-43. At the very least, the agency's failure to respond to these comments and to justify its use of these criteria at the time it promulgated its regulations precludes any conclusion at this time that the regulations are

reasonable. See *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public") (footnote omitted); *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48-50 (1983).

3. The comments pertain to at least one other point. Respondent noted in its brief that although its FOIA request for the comments was "pending," respondent had been informed that the comments had been "lost"; consequently, respondent argued that the "absence of an administrative record alone defeats the Solicitor General's claim for deference." Respondent's Br. 49 & n.12. The letter transmitting the comments indicates that Customs has now provided "all the comments received" in response to the NPRM. See Second Lodging of Respondent at Tab K. Accordingly, respondent now withdraws that portion of its argument that relies on the absence of a complete record as a basis for not giving deference to these regulations. Nevertheless, a complete assessment of the effect of the recovery of these comments on the reasonableness inquiry would be best undertaken, if necessary at all, on remand.

CONCLUSION

For the foregoing reasons and those stated in the Brief of Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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